88-89

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GOLDEN PACIFIC BANCORP.,

Petitioner,

vs.

ROBERT L. CLARKE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Is a bad faith, incorrect, and entirely arbitrary declaration by the Comptroller of the Currency that a national bank is insolvent, thereby causing the bank to close and to suffer irreparable harm, insulated from a damage suit by the "discretionary function" exception to the Federal Tort Claims Act contained in 28 U.S.C. § 2680(a)?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Golden Pacific Bancorp. and respondents Robert L. Clarke, the acting Comptroller of the Currency; the Office of the Comptroller of the Currency; the United States Treasury Department; and the United States of America.

Golden Pacific Bancorp. is the parent of its subsidiary, the Golden Pacific National Bank.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Golden Pacific Bancorp. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on January 26, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 837 F.2d 509, and is reprinted in the appendix hereto, p. 2a, *infra*. The order of the Court of Appeals denying rehearing has not been reported; it is reprinted in the appendix at p. 1a, *infra*.

The United States District Court for the District of Columbia (Flannery, D.J.) issued three Memorandum Opinions and Orders, none of which have been reported. The District Court's opinions, dated December 1, 1986, August 22, 1986, and February 7, 1986, are reprinted in the appendix hereto at pp. 10a, 42a, and 70a, *infra*.

JURISDICTION

The petitioner brought this action in the United States District Court for the District of Columbia, invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1346. On December 1, 1986, the District Court granted summary judgment for the defendants. See p. 10a, *infra*.

Petitioner appealed, and the District of Columbia Circuit Court affirmed the judgment on January 26, 1988. Petitioner filed a timely rehearing petition on March 11, 1988, *see* D.C. Circuit Rule 14(a)(1), and rehearing was denied on April 1, 1988. This petition was filed within 90 days of the denial of rehearing. The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1346. United States as defendant

> (b) The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680. Exceptions

> The provisions of this chapter and section 1346(b) of this title shall not apply to—

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

12 U.S.C. § 191. General grounds for appointment of receiver

> Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association.

STATEMENT OF THE CASE

Petitioner Golden Pacific Bancorp. is a holding company that at all relevant times owned over 90% of the stock of its sole asset, the Golden Pacific National Bank (the "Bank"). The Bank was chartered as a national bank in 1977, with headquarters located in the Chinatown section of New York City. Prior to its closing by the Comptroller of the Currency, nearly all of the Bank's stockholders, employees, and officers were Chinese-Americans, and most of the Bank's customers were from New York's Chinese-American community. The Bank served as a valuable source of economic support for individuals and businesses in the Chinese community, and it enjoyed a fine reputation within that community.

On June 21, 1985, the Comptroller of the Currency shut down the Golden Pacific National Bank, declaring it insolvent and appointing the Federal Deposit Insurance Corporation as receiver. This action, as one of the appellate judges remarked at argument, had the impact of a "nuclear bomb" (Transcript of Oral Argument, November 6, 1987, at p. 21) upon the operation of the Bank, effectively wiping it off the banking landscape. The Comptroller's action in closing the Bank and declaring it insolvent gives rise to this petition for a writ of certiorari, and gave rise to the underlying litigation in the District of Columbia courts.

Petitioner's position, as alleged in the complaint and throughout this lawsuit, is that the Comptroller's action was undertaken in bad faith, and was arbitrary and capricious. Thus, petitioner's Verified First Amended Complaint detailed a set of circumstances under which the Comptroller had previously determined that certain funds invested by bank customers were not bank liabilities, but had changed his position immediately prior to the declaration of insolvency without any notice, hearing, or explanation to the Bank. Moreover, having belatedly determined that the funds were bank liabilities, and hence deposits, the Comptroller unaccountably refused to consider as bank assets the property purchased with those funds. The amended complaint further alleged that Comptroller's closure of the Bank was "negligent," "wrongful," and "arbitrary, capricious and . . . in bad faith." (Compl. ¶¶ 32, 35). Apart from other relief, the complaint sought an award of damages pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"), and accordingly the plaintiff alleged jurisdiction, based upon 28 U.S.C. § 1346(b).

After the amended complaint was filed the defendants sought to dismiss it.[1] With respect to the tort claim under the FTCA,

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[1] The original complaint also alleged a cause of action under the FTCA. The defendants initially moved against this complaint upon procedural grounds, asserting that plaintiff had filed the lawsuit prior to receiving a final administrative denial of its claim. This motion was granted, and the FTCA claim was dismissed without prejudice. See p. 70a. Thereafter, the plaintiff did receive a final administrative denial of its claim, and the FTCA count was realleged in plaintiff's amended complaint.

defendants claimed that the Comptroller's actions were within the "discretionary function" exception to the FTCA contained in 28 U.S.C. § 2680(a), and that therefore the claim was barred by sovereign immunity. The district court disagreed. District Judge Flannery first concluded that petitioner had standing to press the claims of the Bank (which was in liquidation by the FDIC), see pp. 45a-52a, *infra*. He then held that the complaint did state an actionable tort claim against the government, notwithstanding the provisions of 28 U.S.C. § 2680(a) (p. 56a, *infra*):

> This court finds that where the government has engaged in an entirely arbitrary or capricious action, the discretionary function exception is inapplicable and the government is liable for the consequences of its conduct.

The district judge found support for this conclusion in this Court's decision in *Hatahley* v. *United States*, 351 U.S. 173 (1956), and in the decision of the Second Circuit Court of Appeals in *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F.2d 863 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978), where the court suggested that "clear evidence of grossly arbitrary or capricious action" could expose the government to liability in damages even for otherwise discretionary acts. 559 F.2d at 181. Finally, the district judge found (p. 60a, *infra*) that the Comptroller of the Currency was under "the duty not to act arbitrarily in declaring a solvent bank to be insolvent in violation of applicable banking laws." Accordingly, the court denied the defendants' motion to dismiss the FTCA damage claim.

In a subsequent opinion decided on December 1, 1986, the district court denied the government's motion to reconsider its holding with respect to the FTCA. Judge Flannery acknowledged (p. 16a, *infra*) that "the discretionary function exception normally covers the activities of the Comptroller in his regulation and administration of national banks." However, the court ruled that the protection provided by 28 U.S.C. § 2680(a) was not "absolut[e]," and it reiterated that there was a "narrow category of cases" in which the discretionary function exception

would not apply, namely, those cases in which the Comptroller had engaged in "entirely arbitrary and capricious action." (See p. 17a, *infra*).

After reaching this conclusion, the district court considered the merits of the Comptroller's decision to declare the Bank insolvent. Based on his review of the administrative record supplied to the court by the government, Judge Flannery ruled that, without indicating his agreement with the Comptroller's action (see p. 34a, *infra*), the closing of the Bank had not been arbitrary or capricious or undertaken in bad faith. Accordingly, he granted summary judgment and dismissed the complaint.

Petitioners appealed to the District of Columbia Court of Appeals, challenging the district court's view of the merits and claiming that the court had based its judgment on an incomplete administrative record, because the government had refused to lodge with the court certain documents that bank officers had provided to the Comptroller of the Currency during the days immediately prior to the closing of the Bank.

The appellate court, although noting in a footnote its concern with the district court's decision on the merits (see p. 5a n.1, *infra*), affirmed without reaching the merits. The Court of Appeals, citing the Comptroller's "broad authority to ensure that all national banks follow safe and sound banking practices" (p. 7a, *infra*), held that the closing of the Bank was a "discretionary act" immunized from damage liability under 28 U.S.C. § 2680(a). It rejected the district court's holding that "entirely" arbitrary or capricious action could give rise to a damage action under the FTCA, and purported to find support for its holding in this Court's decision in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandenese*, 467 U.S. 797 (1984)("*Varig Airlines*"). The appeals court also distinguished this Court's holding in *Hatahley* v. *United States*, *supra*, upon which the district court had relied, by observing (p. 9a, *infra*) that that case involved government actions that "were illegal on their face."

REASONS FOR GRANTING THE WRIT

There are several reasons for granting a writ of certiorari in this case. First, unless the decision below is reversed, courts will be unable to award tort damages even for utterly lawless, bad faith government activity. The resulting gap in the law is particularly serious in a case such as this one, where injunctive or declaratory relief cannot remedy the consequences of the Comptroller's arbitrary and capricious actions. Second, the decision below is inconsistent with prior holdings in this Court and in other courts. Finally, despite the Court's attempt to clarify the meaning of the "discretionary function" exception to the FTCA in the *Varig Airlines* case, *supra*, the law remains unsettled in the lower courts, and requires further clarification from this Court. We amplify upon each reason in the following discussion.

First, review is appropriate if only to fill in the gaping legal hole that is created by the decision of the court of appeals. Because the lower court did not reach the merits of the Comptroller's action, its ruling means that there is no tort damage remedy even in cases in which government action in closing a bank is undertaken in a wholly lawless and bad faith manner. Thus, the result in this case would be the same even if the plaintiff were able to allege and prove that the Bank was closed because the Comptroller of the Currency acted out of prejudice toward Oriental bankers, or that he acted for wholly personal and improper reasons. Under the lower court's analysis, the declaration of a national bank's insolvency is a discretionary function, and therefore wholly beyond the reach of the FTCA no matter what the circumstances.

This gap in the law is particularly egregious in a case such as this one, where no remedy other than damages exists that offers meaningful redress to the victim of bad faith or lawless government conduct. Sensitive to this weakness, the court below commented (p. 8a n.3, *infra*) that it was not saying that "the Comptroller's action in closing a bank is totally insulated from judicial review, only that damages under the FTCA are ordinarily not available." But this is cold comfort indeed. Thus, while the court noted that the Comptroller's action was reviewable

under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., the available remedies – injunction, mandamus, or declaratory judgment – plainly are insufficient in a case of this nature. Once a national bank has been declared insolvent and dissolved, no injunction or declaration can come close to "unscrambling the omelet" and restoring the bank to its previous position. Indeed, a bank's assets can be placed in receivership and sold to third parties long before the bank's stockholders can obtain review under the Administrative Procedure Act. Thus, in this case, if the plaintiff's allegations on the merits are true, the Comptroller engaged in bad faith conduct that had the practical effect of forever destroying the plaintiff's sole asset. Interpreting the "discretionary function" exception as tolerating this result simply makes no sense. The district judge in this case properly recognized as much, when he held (p. 56a, *infra*) that "where the government has engaged in an entirely arbitrary or capricious action, the discretionary function exception is inapplicable and the government is liable for the consequences of its conduct."

Putting aside the intolerable result that flows from the decision below, this Court should review the case because the court of appeals' holding is inconsistent with prior decisions of this and other courts. In the *Varig Airlines* case, *supra*, upon which the circuit court relied, the Court isolated the central purpose of the "discretionary function" exception to the FTCA: "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." 467 U.S. at 814. Thus, in that case the Court held that the alleged negligence of the Federal Aviation Administration in failing to check certain items in the course of certificating aircraft for commercial flight did not give rise to FTCA liability, because the decision to use a "spot-checking" program was discretionary activity.

Properly applied in this case, the *Varig Airlines* analysis points not in the direction that the court of appeals took, but precisely the opposite way. For one thing, a decision by the Comptroller of the Currency to declare a national bank insolvent is not a decision "grounded in social, economic, [or] political policy."

Id. Indeed, it is not a decision that is discretionary at all. If the liabilities of the bank in question outweigh its assets, then the bank is insolvent. If the opposite is true, then the bank is solvent. The fact that it is the Comptroller who makes the decision does not make that decision a discretionary one, any more than a certified public accountant has "discretion" to decide whether a corporation he has audited is or is not insolvent. The repeated references in the opinion of the court of appeals to "safe and sound bank practices" (p. 7a, *infra*) are therefore beside the point, for the decision that gave rise to the lawsuit was the decision to declare the Bank insolvent and therefore to close it, and not any policy determination that the Bank's practices were or were not safe or sound. *See, e.g., McMichael* v. *United States*, 751 F.2d 303, 307 (8th Cir. 1985)(upholding FTCA claim because government inspectors "were not called upon to make discretionary regulatory judgments. Rather, they had a number of precise inspections to perform which involved no judgment concerning agency policy.").

On a more fundamental level, it is plain that the Court in *Varig Airlines* did not intend to exempt lawless or bad faith administrative action from the reach of the FTCA. Indeed, the complaint in that case dealt only with government action alleged to have been negligent. Moreover, the Court's opinion in *Varig Airlines* indicated that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability." 467 U.S. at 813. It would be ludicrous to suggest that Congress intended to shield bad faith, injurious conduct from damage liability. Rather, as this Court suggested in *Dalehite* v. *United States*, 346 U.S. 15, 34 (1953), the discretion that the exception protects is "the discretion of the executive or the administrator to act according to one's judgment of the best course." It follows that when the admistrator acts in a lawless or bad faith manner—not according to his best judgment, but for improper purposes—the exception does not apply, and damages may be awarded under the FTCA.

This in fact is the teaching of this Court's decision in *Hatahley* v. *United States*, *supra*, the case upon which the district judge relied in deciding that the complaint in this case did state a cause of action for damages. In *Hatahley*, government agents undertook a campaign to round up and destroy horses belonging to a tribe of Navajo Indians. This Court found that the actions of the agents were "wrongful trespasses," motivated by the desire to injure the Navajos and undertaken "with complete disregard" for their property rights. 351 U.S. at 181. In these circumstances, the Court held, the acts complained of did not "involv[e] discretion on the part of the agents," and accordingly the "discretionary function" exception contained in 28 U.S.C. § 2680(a) did not bar a damage action under the FTCA. *Id.* Under *Hatahley*, the allegation of the plaintiff in this case that the Comptroller of the Currency closed the Bank in "bad faith" was sufficient to take the case out of the "discretionary function" exception. Accordingly, the court of appeals' decision to dismiss the case without reaching the merits was contrary to this Court's decisions, and should be further reviewed.

The decision in this case also should be reviewed because it is inconsistent with the decisions of other courts, both in and out of the banking context. The Second Circuit, for instance, held in *Myers & Myers, Inc.* v. *United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975), that the discretionary function exception did not bar a claim that "the Postal Service has acted in contravention of its own regulations, if not unconstitutionally, in denying applicants a hearing prior to debarment from government contracting." 527 F.2d at 1261. The court distinguished cases in which mere abuses of discretion were insulated from liability, holding that "the Postal Service lacked discretion to act in disregard of its own applicable regulations and of the Constitution." *Id.* Similarly, in *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F.2d 863 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978), the Second Circuit rejected an FTCA claim to the extent that it rested upon allegations of mere negligence; however, it indicated that the Comptroller of the Currency's declaration that a national bank is insolvent could give rise to a damage claim if there was "clear evidence of grossly arbitrary or capricious action on [his] part." 559 F.2d at 868. This statement,

of course, is directly contrary to the holding of the court of appeals in the instant case. Likewise, it has been noted in the Tenth Circuit that, while "*conformity* to a discretionary plan isulates the governmental action from review . . . *[d]eviation* from an immune plan . . . can strip the action of the discretionary function exception, for such governmental action does not involve the type of social, economic, or political policy considerations at the core of the exception." *Allen* v. *United States*, 816 F.2d 1417, 1426 n.2 (10th Cir. 1987)(McKay, J., concurring) (emphasis in original), *cert. denied*, 108 S. Ct. 694 (1988). *See also In re Franklin National Bank Securities Litigation*, 445 F. Supp. 723, 734, *aff'd in supplemental opinion*, 449 F. Supp 574 (E.D.N.Y. 1978), where the court refused to dismiss an FTCA claim concerning bank regulators' conduct with respect to a failed bank because discovery might uncover evidence that the regulators' actions were "grossly arbitrary or capricious." The conflict in the authorities is a powerful reason for this Court to grant the writ of certiorari.

Finally, review is appropriate because, notwithstanding this Court's analysis of 28 U.S.C. § 2680(a) in the *Varig Airlines* case, courts generally continue to be all over the lot with respect to the proper scope of the "discretionary function" exception. Two illustrative cases among many are *Brown* v. *United States*, 790 F.2d 199 (1st Cir. 1986), *cert. denied*, 107 S. Ct. 938 (1987), and *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985). In the *Eklof Marine* case, the Second Circuit held that the Coast Guard could be held liable to shipowners whose vessel ran aground because the Coast Guard had placed a navigational buoy in the wrong place. The Second Circuit noted this Court's decision in *Varig Airlines*, but held that, while the decision to mark an obstruction with a buoy might be a discretionary expression of "policy," the actual placement of the buoy could not be so characterized. In the *Brown* case, the First Circuit expressly disagreed with the Second Circuit's holding in *Eklof Marine*, and held that the government was not liable for a fisherman's death that resulted when the National Weather Service gave a faulty weather report as a result of failing to repair or replace a malfunctioning weather reporting buoy. Both courts drew

upon this Court's opinion in *Varig Airlines* to support their differing views of the scope of 28 U.S.C. § 2680(a).

A further catalogue of the conflicting decisions among the circuits that have resulted in the wake of the *Varig Airlines* case may be found in *Allen* v. *United States*, *supra*, 816 F.2d at 1423 n.8 (citing cases). One commentator, upon canvassing the cases, has noted that the opinion in *Varig Airlines* "has . . . had the unfortunate result of further confusing the discretionary function's application . . . ." Comment, "*United States v. Varig:* Can the King Only Do Little Wrongs?" 22 Cal. Western L. Rev. 175, 176 (1985). The unsettled state of the law is a compelling reason for this Court to grant review in the instant case, for the lower courts plainly require a more accurate guide to the proper interpretation of the "discretionary function" exception than this Court's decisions thus far provide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5041 September Term, 1987

GOLDEN PACIFIC BANCORP, et al.

v.

ROBERT L. CLARKE, Acting Comptroller of the Currency, et al.,

BEFORE: Edwards, Silberman and Buckley, Circuit Judges

ORDER

Upon consideration of Appellant's Petition for Rehearing, filed March 11, 1988, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

/s/_____
Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5041

GOLDEN PACIFIC BANCORP, et al., APPELLANT

v.

ROBERT L. CLARKE, ACTING COMPTROLLER OF THE CURRENCY, et al.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 85-02384)

Argued November 6, 1987

Decided January 26, 1988

Jerris Leonard, with whom *Thomas R. Kline*, *Kathleen H. McGuan* and *Charles Emmet Lucey* were on the brief for appellant.

Mary K. Doyle, Attorney, Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General,

Joseph E. diGenova, United States Attorney, and *John F. Cordes*, Attorney, Department of Justice, were on the brief for appellees.

Before: EDWARDS, SILBERMAN and BUCKLEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: Golden Pacific Bancorp ("Golden Pacific"), a bank holding company that controlled Golden Pacific National Bank (the "Bank"), appeals the district court's grant of summary judgment to the government. Golden Pacific sought review under the Administrative Procedure Act of the Comptroller of the Currency's action in declaring the Bank insolvent and appointing the Federal Deposit Insurance Corporation as receiver. Appellant also asked for damages against the government under the Federal Tort Claims Act ("FTCA") and the takings clause of the Fifth Amendment. The district court reached the merits of appellant's claim, holding the Comptroller did not act arbitrarily and capriciously. We affirm but do so on grounds that Golden Pacific's action is nothing more than a claim for damages under the FTCA, and that cause of action is not available to appellant.

I.

On the basis of an informant's tip, the Comptroller began a surprise investigation of the Bank on Monday, June 17, 1985. The Comptroller's examiners discovered that, as the informant had claimed, the Bank had been issuing certificates of deposit, known—because of their color—as "yellow CDs," not recorded on the Bank's books nor available to bank examiners during routine examinations.

The examiners sought to determine whether the yellow CDs were deposits (liabilities of the Bank) or, as Bank

officials claimed, merely investments placed with the Bank as agent. If the former, then the Bank was obliged to show offsetting assets; otherwise the Bank's liabilities would exceed its assets and it would be technically insolvent. Based on their physical appearance and the Bank's method of dealing with the yellow CDs, the Comptroller determined they were deposits and thus liabilities of the Bank. The yellow CDs, like standard certificates of deposit, stated a fixed rate of interest, a set maturity date, and bore the Bank's name across the top in block letters. And the yellow CDs were consistently honored upon maturity or, if appropriate, upon demand. Although the Bank claimed the instruments represented investments the Bank made on behalf of the holders, the Bank did not match the "investors'" money with any investments and did not liquidate any investments or portions thereof when the CDs were paid. According to the Bank, the yellow CDs were subject to a form agreement, which stated the instruments were not deposits and that the Bank was not liable for any loss of funds invested by the customer; however, no *signed* agreements were ever produced.

Alternatively, Bank officials claimed the Bank held adequate off balance sheet assets to cover liabilities represented by the over $15 million in yellow CDs. After repeated demands from the examiners throughout the week, on the last day of the examination bank officials turned over the bulk of the documents it claimed verified the corresponding assets: $7.8 million in the Sand Pebbles Realty Co. (a limited partnership with the Bank's president's wife a general partner), 83 unvalued condominiums in Taiwan, $1 million in bankers' acceptances, an unpaid $800,000 construction loan to T & C Realty Co., and $1.1 million in Bank stock. The examiners, however, believed there was insufficient showing to lead them to conclude that *Bank* assets matched the yellow CDs.

By the end of the week, the Comptroller determined the Bank was engaged in unsafe and unsound banking practices, and he was preparing a cease and desist order directing the Bank to stop soliciting or accepting further off balance sheet deposits. Before the order could issue, the examiners learned of a run on the Bank. Apparently, news of the examination had reached the public and the examiners feared the Bank could not meet the expected withdrawals. Faced with this turn of events, the Comptroller declared the Bank insolvent at 10:20 p.m. on the night of Friday June 21, 1985 and placed it in receivership.

II.

Golden Pacific would have us entertain its challenge to the reasonableness of the Comptroller's actions, but neither the APA nor the FTCA permits us. Appellant asserts that a careful review of all the documentation should have led the Comptroller to conclude that the Bank was in fact solvent and that it had sufficient liquidity to meet depositors' demands.[1] But at oral argument counsel for appellant conceded that the only relief appellant seeks is money damages; no specific relief under the APA is any longer—if it ever was—at issue. Golden Pacific's claim under the APA, it seems to us, serves only

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[1] The appellant also claims the district court granted summary judgment on an incomplete administrative record because the government refused to lodge with the court certain documents turned over to the examiners by bank officers, pending a criminal investigation by the U.S. Attorney's Office in New York City. The government sought and obtained stays of appellant's discovery based on *in camera* filings. We have previously expressed our concern with this procedure employed by the Justice Department. *See Weil v. Markowitz*, 829 F.2d 166, 174 & n.17 (D.C. Cir. 1987), and we do not believe the government entitled to litigate the merits of the Comptroller's actions on an incomplete record because of a pending criminal proceeding. Since we do not reach the merits, however, we have no need of the complete record.

as a device upon which to predicate damages for alleged arbitrary and capricious actions of the Comptroller. This, however, appellant cannot do.

One cannot sue the federal government unless one finds a waiver of sovereign immunity. The FTCA, upon which appellant primarily proceeds, authorizes damage suits against the United States for negligent or wrongful acts of its employees but limits such actions by exempting

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused.*

28 U.S.C. § 2680(a) (1982) (emphasis added).

The district court thought this language waived sovereign immunity for even discretionary acts unless some level of "due care" was exercised. *See Golden Pac. Bancorp v. Clarke*, No. 85-2384 (D.D.C. Aug. 22, 1986), *reprinted in* Joint Appendix ("J.A.") at 37, 44. But the due care requirement applies only to the first part of the clause; a claim based upon the exercise of a discretionary function is barred even if discretion is abused. Congress thought "[i]t . . . neither desirable nor intended that . . . the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort." *United States v. S.A. Empresa de Viacao Area Rio Grandenese*, 467 U.S. 797, 809-10 (1984) ("*Varig Airlines*") (quoting *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea)). Thus the so-called discretionary function exception to the FTCA reaches all those governmental actions "where there is

room for policy judgment and decision." *Dalehite v. United States*, 346 U.S. 15, 36 (1953); *see also Varig Airlines*, 467 U.S. at 819-20.

To be sure the Supreme Court has not attempted to "define with precision every contour of the discretionary function exception," *Varig Airlines*, 467 U.S. at 813, but the actions complained of here seem the very paradigm Congress had in mind in fashioning the exception. Congress has given the Comptroller broad authority to ensure that all national banks follow safe and sound banking practices. 12 U.S.C. § 1818(b) (1982). The Comptroller's determinations as to whether the yellow CDs were to be regarded as liabilities and whether the Bank made an adequate showing of non-booked offsetting assets to cover those liabilities appear to us obvious policy judgments regarding what constitutes safe and sound bank practices. And surely the decision to close the Bank —made after a week of examination and in the face of a run of withdrawals—could not possibly be thought of as other than a discretionary act that was committed by Congress to the Comptroller's judgment. *See* 12 U.S.C. § 191 (1982). "Judicial intervention in such decision-making through private tort suits would require the courts to 'second-guess' the political, social, and economic judgments of an agency. . . ." *Varig Airlines*, 467 U.S. at 820. That would be so even were a court subsequently to determine as a mater of law that the yellow CDs were not liabilities.[2] The Comptroller, incident to his responsibilities, must make innumerable subtle judgments in describing the content of safe and sound bank practices—judgments that draw upon a mix of law, accounting, bank custom, and policy. Sometimes, as here, those determina-

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[2] The Comptroller's conclusion was actually confirmed by a federal district court in an action brought by the FDIC, which as we indicated, was appointed receiver by the Comptroller. *FDIC v. Holders of Yellow Certificates Nos. 1-367*, No. 85-8164 (S.D.N.Y. Sept. 16, 1986), *reprinted in* J.A. at 78.

tions must be made under grave pressure and expeditiously. The government is not liable in damages merely because in a particular case the Comptroller's conclusion or some aspect of it turns out to be legally vulnerable.[3]

The district court believed the discretionary function exception to the FTCA's waiver of sovereign immunity to be somehow affected by the APA's authorization of review of arbitrary and capricious agency action. 5 U.S.C. § 706(2)(A) (1982). The court concluded accordingly that the exception did not apply to "*entirely* arbitrary and capricious action." J.A. at 43 (emphasis added). We have, however, already explained the interrelationship of the two statutes. The government's waiver of sovereign immunity under the APA is much broader than under the FTCA, thus "[u]nder the former statute, it is clear that agency action is reviewable (by injunction, mandamus or declaratory judgment[4]) for abuse of discretion, but under the latter even a *gross abuse of discretion* will not predicate an award of tort damages." *Scanwell Laboratories v. Thomas*, 521 F.2d 941, 948 (D.C. Cir. 1975) (footnote added; citation omitted; emphasis added), *cert. denied*, 425 U.S. 910 (1976). The district court's formulation, "entirely arbitrary or capricious," is merely another way of describing a "gross abuse of discretion." Nor is *Hatahley v. United States*, 351 U.S. 173 (1956), relied on by the district court and appellant, to the contrary. There the Supreme Court permitted an FTCA claim against the government because the challenged actions, although ostensibly within

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[3] That is not to say, of course, that the Comptroller's action in closing a bank is totally insulated from judicial review, only that damages under the FTCA are ordinarily not available.

[4] Appellant's request for a declaratory judgment serves no purpose other than as a predicate for damages; it cannot thereby circumvent the discretionary exception to the FTCA. *See Ireland v. Shultz*, 829 F.2d 1189, 1192 & n.5 (D.C. Cir. 1987).

the scope of the government's agents' authority, were illegal on their face and moreover, the court concluded, did not involve a delegated exercise of discretion. *Id.* at 181.

We do not reach appellant's alternative theory of recovery under the Fifth Amendment because it was first argued only on appeal in appellant's reply brief. As we have stated before, "[c]onsidering an argument advanced for the first time in a reply brief . . . is not only unfair to the appellee but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (citations omitted); *see also Environmental Defense Fund v. Costle*, 657 F.2d 275, 284 n.32 (D.C. Cir. 1981); *United States v. Haldeman*, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976) (en banc) (per curiam), *cert. denied*, 431 U.S. 933 (1977). We do not "sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before [us]." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

Accordingly, the judgment of the district court is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLDEN PACIFIC BANCORP.,

Plaintiff,

v.

ROBERT L. CLARKE, Comptroller of the Currency,

Defendant.

Civil Action No. 85-2384

MEMORANDUM

This matter came before the court on defendants' Motion for Reconsideration, or in the Alternative, for Certification for Interlocutory Appeal. For the reasons set forth below, summary judgment is entered in favor of defendants.

I. Background

This case and the related case of Chuang

v. Federal Deposit Insurance Corp., et al., C.A. No. 86-1415, arise from the same series of events. On June 21, 1985, the U.S. Comptroller of the Currency ("Comptroller") declared the Golden Pacific National Bank ("Bank") insolvent, and appointed the Federal Deposit Insurance Corporation ("FDIC") as Receiver for the Bank. Plaintiff Golden Pacific Bancorp ("Bancorp") is the majority shareholder of the Bank. Plaintiff's action challenges the Comptroller's decision, by which plaintiff lost its sole asset. Plaintiff seeks damages and injunctive relief in the form of a restoration of the Bank's charter to operate as a national bank. Plaintiff's complaint alleges a violation of the Fifth Amendment to the U.S. Constitution,

arbitrary and capricious action in violation of the Administrative Procedure Act, 5 U.S.C. § 552 et seq., and negligence cognizable under the Federal Tort Claims Act, 28 U.S.C. § 2680 ("FTCA").

On August 22, 1986, this court issued an Order denying defendant's Motion to Dismiss, and holding that defendant's actions were not necessarily protected by the 'discretionary function' exception to the FTCA. Golden Pacific Bancorp. v. Clarke, No. 85-2384, Memorandum (D.D.C. Aug. 22, 1986). The court held that plaintiff must be given "the opportunity to show that the Comptroller's actions were entirely arbitrary and made in bad faith," and thus beyond the protection of the FTCA's exception for discretionary

functions. Id. at 8. Accordingly, the court ordered that the administrative record upon which the Comptroller's action had been based be filed, so that plaintiff could attempt to carry this "very heavy burden," id., as to the Comptroller's conduct.

On October 1, 1986, this court issued an Order denying defendant's Motion to Dismiss, and holding that defendant's actions were not necessarily protected by the 'discretionary function' exception of the FTCA. Golden Pacific Bancorp. v. Clarke, No. 85-2384, Memorandum (D.D.C. Aug. 22, 1986). The court held that plaintiff must be given "the opportunity to show that the Comptroller's actions were entirely arbitrary and made in bad faith,"

and thus beyond the protection of the FTCA's exception for discretionary functions. Id. at 8. Accordingly, the court ordered that the administrative record upon which the Comptroller's action had been based be filed, so that plaintiff could attempt to carry this "very heavy burden," id., as to the Comptroller's conduct.

On October 1, 1986, the Comptroller filed the administrative record upon which his decision of June 21, 1986 was based, along with the present Motion for Reconsideration or in the Alternative for Summary Judgment or Interlocutory Appeal.

II. Defendants' Motion to Reconsider

Before reviewing the administrative record, the court must consider defendant's

Motion for Reconsideration of its August 22, 1986, Memorandum and Order. Plaintiffs contend that "[t]he court incorrectly determined that, as a matter of law, plaintiff's tort claim is cognizable under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq." Defendants' Memorandum of Points and Authorities in support of Defendants' Motion for Reconsideration (Defendants' Memorandum") at 2. Plaintiff asks this court to find that the determination that a bank is insolvent is entrusted to the Comptroller's discretion under 12 U.S.C. § 191, and is therefore always within the discretionary function exception to the FTCA. Id. In addition, plaintiff asks this court to reconsider its holding that the government has an

actionable duty to plaintiff with respect to the regulation and supervision of national banks.

This court gave ample consideration to these arguments when they were presented in defendants' Motion to Dismiss earlier in this litigation. Defendants have not cited new authorities, but instead ask this court to reassess its reading of the authorities defendant relied upon earlier.

As the court made clear in its August 22, 1986, Memorandum and Order, the discretionary function exception normally covers the activities of the Comptroller in his regulation and administration of national banks. However, the court declined to accept defendants' argument that this exception protects the

Comptroller absolutely. Instead, the court noted a narrow category of cases wherein the Comptroller "has engaged in an entirely arbitrary and capricious action," and the discretionary function exception is therefore "inapplicable and the government is liable for the consequences of its conduct." Golden Pacific Bancorp v. Clarke, No. 85-2384, Memorandum at 7-8 (D.D.C. Aug. 22, 1986). The court found, based on Hatahley v. U.S., 351 U.S. 173 (1956), that the FTCA "clearly indicates that some level of 'due care' is necessary." Id. at 8. Defendants have offered no support, other than their restated argument, that should compel the court to reconsider its August 22, 1986, holding as to the breadth of the discretionary function limitation on the

government's liability under the FTCA and, accordingly, defendants' motion to reconsider is denied.

Similarly, defendants' renewed argument as to the duty of the United States to the Bank does not compel reconsideration of the court's August 22, 1986, Memorandum on this issue. In that Memorandum, the court found that the government owes a duty to the Bank "not to act arbitrarily in declaring a solvent bank to be insolvent in violation of applicable banking laws." Golden Pacific Bancorp v. Clarke, No. 85-2384, Memorandum at 9 (D.D.C. August 22, 1986). Defendants argue that the case of Indian Towing Co. v. U.S., 350 U.S. 61 (1955), upon which the court relied in rendering its August 22, 1986, decision, is

distinguishable from the case at bar. However, this alone is insufficient reason for the court to reconsider its holding.

As with the issue of the discretionary function exception, the court's August 22, 1986, Memorandum set forth a narrowly defined duty owed by the government to banks. These holdings do not undercut the more general principle as to the breadth of the Comptroller's discretion "in accomplishing his statutory mission." Defendants' Memorandum at 20. They merely establish a standard beneath which the Comptroller's conduct may not fall and still be fully insulated from redress. This standard is defined by the "arbitrary and capricious" and "bad faith" language set forth in the August 22, 1986,

Memorandum, to which this court continues to adhere.

III. Defendants' Motion for Summary Judgment

Defendants move, in the alternative, for summary judgment based upon the administrative record filed together with defendants' Motion. Because the actionable standard, discussed above, is so narrowly defined, this court's task is a fairly simple one. The court need only find that the Comptroller's decision was not arbitrary, capricious, or made in bad faith to conclude that it is not actionable under the FTCA, see § II, supra, as well as under the Administrative Procedure Act, 5 U.S.C. § 706. See Camp v. Pitts, 411 U.S. 138, 142, 133 S.Ct. 1241, 1244 (1973) ("In applying [the arbitrary and capricious]

standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). This level of review is, of course, "a highly deferential one, which presumes the agency's action to be valid." Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations omitted). See also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824 (1971) (". . . the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."). As this court stated in its August 22, 1986, Memorandum:

> With regard to actions by the Comptroller, the court agrees with the Second Circuit that 'Absent clear

> evidence of grossly arbitrary or capricious action . . . it is not for the courts to say whether or not the actions taken were justified.'

Golden Pacific Bancorp. v. Clarke, No. 85-2384, Memorandum at 8 (D.D.C. Aug. 22, 1986), quoting Huntington Towers, Ltd. v. Franklin National Bank, 559 F.2d 863, 868 (2d Cir. 1977). Accordingly, summary judgment is proper if, in the administrative record submitted, "a rational basis for the agency's decision is presented." Environmental Defense Fund, Inc. v. Costle, 657 F.2d at 283.

It is clear from the administrative record in this case that the Comptroller's decision was rationally based and was not arbitrary, capricious, or made in bad faith. The record indicates that the

following sequence of events led up to the Comptroller's decision:

(1) In May, 1985, the Office of the Comptroller of the Currency ("OCC") received information from a confidential source that the Bank was soliciting and accepting deposits in the form of special certificates of deposit. Printed on yellow paper, these certificates of deposit came to be known as 'yellow CDs.' The informant told OCC officials that these yellow CDs were not recorded on the Bank's books, and had not been presented to OCC officials during previous Bank examinations. The informant stated that the monies obtained through the sale of these yellow CDs were used to fund investments that were in the name not of the Bank but of family members

of Bank officers. Affidavit of Robert V. Ahrens (Ahrens Aff."), ¶2; Administrative Record ("AR") at 1809-1817 (correspondence from and regarding the informant).

(2) On June 17, 1985, the OCC commenced a 'surprise' examination of the Bank. Ahrens aff., ¶4; AR at 8-12. Examiners were dispatched to the Bank's main office in New York City (at 241 Canal Street, Manhattan), as well as to its five loan production offices throughout the U.S. Ahrens aff., ¶4.

(3) The Bank's Cashier and Vice President, Ms. Teresa Shieh, provided the examiners with a set of index cards which were the Bank's only record of the yellow CDs that the informant had described to OCC officials. Under the examiners'

supervision, Bank employees matched these index cards to the Bank's copies of outstanding yellow CDs. Ahrens aff., ¶6; AR 564-1192. As a result of this matching process, examiners determined that the Bank had issued approximately $15.7 million in yellow CDs as of April 30, 1985. AR at 9; AR at 158.

(4) In addition to reciting the amount deposited, the holder's name, the date, and rate of interest, the yellow CDs also provided that:

> This certificate is subject to the terms and conditions described in the agreement between the above-named customer and the Bank dated [blank] 19__.

Exhibit B to Plaintiff's Verified Complaint; AR at 34. While the examiners requested access to the signed agreements

which Bank officers claimed existed between yellow CD customers and the Bank, officials provided only a single, blank form. No signed agreements were ever produced by Bank officials, despite repeated requests throughout the week of June 17-21, 1985. AR at 534 (blank agreement, on which bank examiner noted failure of Ms. Shieh to produce any signed agreements or other evidence of customers' knowledge of the terms of the agreement).

(5) The proceeds of the sales of yellow CDs were pooled in accounts maintained under fictitious names: the "Amy Chen" account was used to deposit funds received from sales of yellow CDs; the "Susan Wang" and "Thomas Wang" accounts were used to pool accrued interest earned on the yellow

CDs. Ahrens aff., ¶9. The signature card for the "Thomas Wang" account had been signed by Ms. Shieh. AR at 547.

(6) Yellow CDs were redeemed by the Bank upon demand or at maturity, and were paid out of the "Amy Chen" account. AR at 4; AR at 337 (Account statement for "Amy Chen"). As of June 20, 1985, this account was overdrawn in the amount of $1.8 million. Id.

(7) Examiners repeatedly demanded from Bank officials information documenting the existence of any valid assets to offset the $15.7 million in liabilities represented by the yellow CDs. Finally, on Friday, June 21, 1985, Ms. Shieh gave examiners a verbal outline of assets in which the yellow CD funds had been invested. These investments

were not in the Bank's name, and no documentation was offered to indicate the bank's ownership or legal interest in these investments. Ahrens aff., ¶10; AR 10-11. One investment was in a company called Sandpebbles Realty, in the amount of approximately $7.8 million. Sandpebbles Realty is a partnership in which the wife of Mr. Joseph Chuang, the President and Chairman of the Board of the Bank, is a general partner. AR at 11.

(8) Bank examiners concluded that the Bank had "non-booked" liabilities which exceeded "non-booked" assets (in which the Bank could document a legal interest) by $6,634,931. Accordingly, on the evening of June 21, 1986, Deputy Comptroller of the Currency Michael Patriarca declared the

Bank insolvent and appointed the FDIC as receiver. AR at 14.

In addition to these facts, which fully justify the OCC's actions under the deferential standard of review applicable to this case, there were also indications on June 21 that a deposit run had been taking place at the Bank as a result of stories in Chinese newspapers referring to problems at the bank. OCC officials determined that the Bank did not have sufficient cash on hand to meet the demands of its customers for the remainder of the day of June 21. The Bank was scheduled to be open the following day, Saturday, June 22, 1985. Ahrens aff., ¶12. This set of circumstances, combined with the examiners' discoveries as to the yellow CDs and the

absence of any booked assets to cover the liability they represented, led to the Bank's closing on the evening of June 21, 1985.

Plaintiff contends that it was an abuse of discretion for OCC officials to have treated the yellow CDs as liabilities of the Bank. Plaintiff contends that the yellow CDs represented not a depositor relationship but instead an agency relationship, with the Bank acting as an investment agent for its customers. The administrative record indicates that OCC officials considered and rejected this argument, citing several compelling reasons for so doing:

(1) No signed agreement forms had been presented to Bank officials. Ahrens aff.,

¶8; AR at 534. It was these forms which purportedly transformed the yellow CDs from deposits, and hence liabilities of the Bank, to investment agreements, and hence non-liabilities.

(2) The bank consistently honored the yellow CDs upon maturity or demand without a corresponding liquidation or sale of purportedly corresponding investments. AR at 163. This conduct is consistent with a depositor relationship, not an agency relationship, to the Bank.

(3) There was no matching of specific deposits with specific investments, which would be characteristic of an agency relationship.

(4) The interest rate on the CDs was fixed, which is consistent with a

certificate of deposit. AR at 34, 522-1039. The interest rate on an investment would typically be tied to the risk associated with investing in the corresponding asset.

All these factors caused OCC officials to reject the Bank's contention that the yellow CDs were not liabilities of the Bank. Clearly, these factors support the agency's decision under the standard of review that this court is to apply.

Finally, plaintiff contends that the OCC was aware of the Bank's practice of accepting funds from customers and pooling them in a custodial account. Plaintiff points to a 1981 examination of the Bank, in which the Bank's accounting for certain certificates of deposit was criticized by

examiners in their report. Plaintiff contends that the OCC somehow changed its policy toward these certificates during the 1985 examination, and that this change in policy constituted arbitrary and capricious conduct.

The critical difference between the OCC's 1981 criticism of the Bank's practices and the OCC's determination in the 1985 examination that the Bank was insolvent in this: in 1981, the certificates of deposit appeared on the Bank's books and were subject to examination. In 1985 these CDs were concealed from OCC officials, did not appear on the Bank's books, and were used to fund off-balance-sheet assets which were not held in the Bank's name. The 1985 transactions are clearly distinguishable

from the 1981 transactions, which the OCC recognized as legitimate, but which were improperly accounted for under Federal Reserve regulations, 12 C.F.R. §§ 204.2 and 217.3. Ahrens aff., ¶18. There is no need for any additional discussion of this contention on plaintiff's part; indeed for plaintiff to insist that this fraudulent activity is or should have been sanctioned by the OCC is unworthy of even this much of the court's attention.

Accordingly, summary judgment for defendants is warranted here. The administrative record amply supports the conduct of OCC officials in determining that the Bank was insolvent on June 21, 1986. It is worth repeating that the court need not find that it agrees with the

Comptroller's determination. Rather, the court need only find an absence of arbitrary, capricious, or bad faith conduct on the part of Government officials in their handling of the affairs of the Bank. Such an absence is clear on this record, and the court need go no further in its analysis.

Finally, a brief discussion of plaintiff's claim that Mr. Patriarca lacked the authority to declare the bank insolvent is required. Section 4a of 12 U.S.C. states that, "[t]he Comptroller of the Currency may delegate to any duly authorized employee, representative, or agent any power vested in the office by law." It is undisputed that the Comptroller of the Currency has the

authority to declare a national bank insolvent and place it in receivership. At oral argument, defendants offered two documents by which that authority was delegated to Mr. Patriarca. Under the first, dated March 2, 1984 and identified as Defendants' Exhibit 1 for Oral Argument, Comptroller C.T. Conover delegated to the Senior Deputy Comptroller for Bank Supervision authority to "Declar[e] the insolvency of, and appoint[] a receiver for, a national bank pursuant to 12 U.S.C. § 191 and § 1821(c)." Under the second, dated May 5, 1985 and identified as Defendants' Exhibit 2 for Oral Argument, H. Joe Selby, Acting Comptroller, delegated to Mr. Patriarca "all powers, duties, authorities, and responsibilities currently

delegated to the Senior Deputy Comptroller for Bank Supervision." By these two delegations, and under 12 U.S.C. § 4a, Mr. Patriarca had the authority to declare the Bank insolvent on June 21, 1986.

IV. Defendants' Motion for Certification

There is no need to reach defendants' final motion for certification for interlocutory appeal given that summary judgment as to plaintiff's entire complaint is appropriate.

V. Plaintiff's Motion to Strike Defendants' Notice of Filing

It should be noted that the above discussion is based upon the administrative record filed in this court on October 1, 1986. The materials filed by defendants ex parte and under seal on November 17, 1986,

do not constitute a part of the administrative record. Rather, these materials were relevant to defendants' Motion for Protective Order, and were submitted in support of that motion. Because the court finds that summary judgment for defendants is proper, defendants' Motion for Protective Order is dismissed as moot, as is plaintiff's Motion to Strike Defendants' Notice of Filing.

An appropriate Order accompanies this Memorandum.

/s/
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - - X

GOLDEN PACIFIC BANCORP, :

Plaintiff, :

- against - :Civil Action No. 85-2384

ROBERT L. CLARKE, Comptroller of the Currency, :

Defendant. :

- - - - - - - - - - - - - - - - - X

ORDER AND JUDGMENT

This matter came before the court on defendants' Motion for Reconsideration or in the Alternative for Summary judgment or in the Alternative for Certification for Interlocutory Appeal, defendants' Motion for a Protective Order, and Plaintiff's Motions to Strike the Affidavit of Robert

V. Ahrens and to Strike Defendants' Notice of Filing. Upon consideration of the parties' motions and the memoranda in support thereof, the opposition thereto, oral argument, and the entire record herein, it is by the court this 1st day of December, 1986

ORDERED that the plaintiff's Motion to Strike the Affidavit of Robert V. Ahrens is denied; and it is further

ORDERED that plaintiff's motion to Strike Defendants' Notice of Filing is denied; and it is further

ORDERED that defendants' Motion for Protective Order is denied; and it is further

ORDERED that defendants' Motion for Summary Judgment is granted; and it is

further

ORDERED, ADJUDGED, AND DECREED that summary judgment be, and hereby is, entered in favor of defendants.

/s/_____
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLDEN PACIFIC BANCORP.,	:
Plaintiff,	:Civil Action No. 85-2384
- against -	:
ROBERT L. CLARKE, Comptroller of the Currency, et al.,	:
Defendants.	:

MEMORANDUM

This matter comes before the court on defendants' motion to dismiss plaintiff's first amended complaint and on defendants' motion for a protective order staying discovery. For the reasons set forth below, defendants' motion to dismiss is denied and defendants' motion to stay discovery is granted.

I. Background

Plaintiff Golden Pacific Bancorp. ("Bancorp") is the majority stockholder of the Golden Pacific National Bank ("Bank"). On June 21, 1985, the U.S. Comptroller of the Currency ("Comptroller") declared the bank insolvent and appointed the Federal Deposit Insurance Corporation ("FDIC") to act as receiver for the Bank. From this action, Bancorp allegedly lost its only asset, worth $166 million.

On July 25, 1985, plaintiff brought suit in this court, alleging violation of the Fifth Amendment, arbitrary and capricious action in violation of the Administrative Procedure Act ("APA"), and negligence cognizable within the Federal Tort Claims Act ("FTCA"). On November 27, 1985,

defendants filed a motion for judgment on the pleadings. In a Memorandum and Order of February 7, 1986, this court dismissed without prejudice plaintiff's negligence claim because plaintiff's administrative remedies had not been exhausted pursuant to 28 U.S.C. § 2675 (1982). Upon exhaustion of those remedies, plaintiff was allowed to file an amended complaint on May 9, 1986.

On June 9, 1986, defendants filed a motion to dismiss plaintiff's first amended complaint. On July 21, 1986, defendants filed a motion for a protective order staying discovery. A hearing was held on these motions on August 19, 1986. The motions are considered separately.

II. Defendants' Motion to Dismiss

Defendants assert three bases for why

plaintiff's complaint should be dismissed: (1) plaintiff lacks standing to maintain this action; (2) the United States is not subject to tort liability for alleged negligent regulation of a national bank; and (3) the United States owes no actionable tort duty to the Bank. The court finds that none of these bases bears up under scrutiny.

A. Standing

Defendants argue that plaintiff Bancorp is trying to assert not its own rights, but those of the Bank. As defendants see it, plaintiff is nothing more than a majority shareholder in the Bank - a separate and distinct corporate entity. Any alleged wrongs by the Comptroller were committed against the Bank and its assets, not

against plaintiff. Since neither officers nor stockholders can maintain a direct action to redress an injury to their corporation even though the value of their stock is impaired, Gregory v. Mitchell, 634 F.2d 199, 202 (5th Cir. 1981), then neither can plaintiff here. This holds true even where the FDIC has stepped in and appointed a receiver for the bank. See Gregory, supra; FSLIC v. Williams, 599 F. Supp. 1184, 1207 (D. Md. 1984); Stevens v. Lowder, 643 F.2d 1078, 1080 (5th Cir. 1981). Defendant argues that plaintiff has not pursued the only avenue open to it for a shareholder action - a derivative suit under Federal Rule of Civil Procedure Rule 23.1. That rule specifically authorizes suits by shareholders pursuant to certain

requirements.

Plaintiff responds that it is in a unique position because it is the majority shareholder of the Bank, possessing more than 90% of the Bank's shares. Further, plaintiff Bancorp has no other purpose than to act as a bank holding company, owning and controlling the Bank in all its actions. Bancorp's only assets are its shares in the Bank. Plaintiff argues that the rules of standing recognize plaintiff as a party to sue in its own right, see, e.g., Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978), because there is a distinct and palpable injury to Bancorp caused by defendants for which this court can grant relief. Plaintiff also argues that it can

sue as an interested third-party because the Bank itself cannot assert its own rights since it is now under the exclusive control of the defendants' receiver. See Warth v. Seldin, 422 U.S. 490, 501 (1975) (standing may extend to litigants who are so situated that they may properly assert the rights of others). Since Bancorp was in a close relationship with the Bank, but the Bank cannot vindicate its own rights, third-party standing is necessary to vindicate the Bank's rights. See NAACP v. Alabama, 357 U.S. 449 (1958) (civil rights organization has third-party standing to resist production of membership records to protect the rights of its individual members); Craig v. Boren, 429 U.S. 190 (1976) (licensed beer seller has third-

party standing to assert the equal protection rights of would-be male customers in opposition to a state law prohibiting the sale of beer to males under age 21); Singleton v. Wulff, 428 U.S. 106 (1976) (physicians have third-party standing to assert privacy rights of Medicaid patients seeking abortions).

This court finds that standing does exist for plaintiff Bancorp to pursue this action. The doctrine of standing is designed to assure that real parties in interest are joined in a case or controversy sufficient to invoke this court's jurisdiction. See Baker v. Carr, 369 U.S. 186, 204 (1982). Unlike the cases cited by defendants, plaintiff here is not just an officer or a few shareholders of a

corporation. Plaintiff Bancorp is the Bank's holding company. Bancorp held more than 90% of the Bank's stock; its sole function was to own and operate the Bank. When the Bank was declared insolvent there was an immediate and direct economic loss to plaintiff of all its assets and its underlying purpose. The injunctive relief and damages sought by plaintiff can properly issue from this court if the injury is proven caused by defendants. The relationship of nearly complete ownership of the Bank by Bancorp is important and distinguishes this case from the FIfth Circuit cases of Gregory and Stevens, supra. Defendants appropriately point out that even in normal circumstances a majority shareholder cannot sue directly on

behalf of his corporation just as that shareholder cannot be sued by someone else for a claim against the corporation. Yet the Bank, in liquidation by the FDIC, can no longer be said to have independent existence with regard to these claims. Bancorp is uniquely situated to advance the present claims of the Bank.

Even if it is more properly said that Bancorp is asserting third-party standing, compliance with the procedural requirements of FRCP Rule 23.1 in this situation is unnecessary. As the receiver of the Bank, the FDIC cannot be expected to sue either itself or other federal agencies for improperly declaring the Bank to be insolvent. Indeed, the Bank is now in the hands of the very entity that needs to be

sued to vindicate the Bank's rights. The government suggests that plaintiff must amend its complaint to state explicitly that it is futile to petition the FDIC, but this court refuses to engage in hypertechnical requirements. The purpose of Rule 23.1's requirement that the corporation be asked first to vindicate its own rights is not served when it is clear that the corporation cannot do so.

B. Liability for Negligent Regulation Of a Bank

Defendants argue that plaintiff's claims are based upon the exercise of discretionary functions as to which FTCA has explicitly not waived the government's sovereign immunity. Whether or not discretion has been abused, discretionary

acts of federal officials are outside the scope of FTCA. 28 U.S.C. 2680(a); United States v. S.A. Empresa De Viacao Aerea Rio Grandense, 104 S. Ct. 2755, 2762, reh'g denied, 82 L.Ed.2d 919 (1984).

Plaintiff seeks to impose tort liability on the United States for various actions by the Comptroller: (1) the treatment of funds through the sale of certain certificates as deposits creating liabilities; (2) the refusal to offset these liabilities with the investments made by the Bank from the funds received from the certificates; and (3) the consequent declaration of the Bank as insolvent.

Defendants argue that each of these allegedly wrongful acts involves the exercise of administrative discretion by

the Comptroller in carrying out his official duties, specifically conducting periodic bank examinations and deciding to close a failing bank. 12 U.S.C. § 191 provides that:

> whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs . . . appoint a receiver, who shall proceed to close up such association.

As defendants see it, plaintiff's assertions that the Comptroller wrongfully determined the Bank's liabilities or, alternatively, should have treated the investments made with the certificate funds as Bank assets, involve exactly the type of regulatory activity that Congress exempted from FTCA coverage. See Emch v. United States, 630 F.2d 523, 525-28 (7th Cir.

1980), cert. denied, 450 U.S. 966 (1981).

FTCA does not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). Defendants argue that the process of determining the point at which a bank is no longer able to meet its obligations as they fall due involves a substantial amount of discretion.

Plaintiff responds that the "discretionary function" exception to FTCA does not apply to all governmental decisions and actions involving the

exercise of judgment. The exception does not apply to arbitrary and capricious governmental decisions, nor to governmental decisions involving professional judgment.

This court finds that where the government has engaged in an entirely arbitrary or capricious action, the discretionary function exception is inapplicable and the government is liable for the consequences of its conduct. Hatahley v. United States, 351 U.S. 173, 181 (1956) (the government must act with at least some minimal concern for the property rights of others). With regard to actions by the Comptroller, the court agrees with the Second Circuit that "[a]bsent clear evidence of grossly arbitrary or capricious action . . . it is not for the courts to

say whether or not the actions taken were justified . . . ." Huntington Towers, Ltd. v. Franklin National Bank, 559 F.2d 863, 868 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978). Indeed, plaintiff has a very heavy burden in proving this claim, since even a gross abuse of discretion may not predicate an award of tort damages. Scanwell Laboratories Inc. v. Thomas, 521 F.2d 941, 948 (D.C. Cir. 1975). Yet the statute clearly indicates that some level of "due care" is necessary. Hatahley, supra, at 18. This court finds that plaintiff is entitled to the opportunity to show that the Comptroller's actions were entirely arbitrary and made in bad faith. The court notes that defendants' failure to provide any administrative record prevents

this court from deciding that the Comptroller's conduct was clearly not arbitrary. Absent such a record, this court cannot, as a matter of law, deny plaintiff the opportunity to show otherwise.

C. The United States' Duty to Plaintiff's Bank

Defendants argue that independent of 28 U.S.C. § 2680(a), plaintiff's tort claim fails to state any cause of action against the United States. As defendants see it, the United States, its agencies and officials, owe no duty, in tort or otherwise, to conduct bank examinations in a particular manner and to treat certain bank funds as custodial accounts rather than as deposits (and liabilities) of the

bank.

Defendants point out that no actionable duty running to the regulated institutions arises from national banking statutes. In re Franklin National Bank Securities Litigation, 479 F. Supp. 210, 214 (E.D.N.Y. 1979); In re Franklin National Bank Securities Litigation, 445 F. Supp. 723 (E.D.N.Y. 1978). FTCA liability attaches only under circumstances where a private person would be liable in accordance with the law of the state where the tort occurred. New York law is silent on whether a private person would be liable in a similar circumstance since private persons do not engage in the examination, supervision, and liquidation of national banks on behalf of the public. Thus,

negligent bank regulation is entirely outside the class of "ordinary common-law torts" made actionable by the FTCA.

This court agrees with plaintiff that the government does owe a duty to the Bank. This duty is not a duty to discover improper conduct within the bank, which was the question in the In re Franklin cases, but rather the duty not to act arbitrarily in declaring a solvent bank to be insolvent in violation of applicable banking laws. The fact that a private person cannot be found liable since this is a uniquely governmental act does not immunize the government.

> [T]he United States' liability is not restricted to the liability of a municipal corporation or other public body . . . an injured party cannot be deprived of his rights under the

> (Federal Tort Claims) Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity.

Rayonier, Inc. v. United States, 352 U.S. 315 (1957). In some sense, all governmental activity is "uniquely governmental" since it is performed by the government. Indian Towing Co. v. United States, 350 U.S. 61, 64 (1955). Further, private persons in the role of accountants routinely examine and audit banks and are subject to liability for wrongful conduct. The exact same responsible conduct is expected of the Comptroller and capricious violations fall within the ambit of the FTCA.

III. Defendants' Motion for a Protective Order

On July 21, 1986, defendants moved for a protective order pursuant to FRCP Rule 26(c) to extend the stay of discovery from July 1, 1986 to October 1, 1986. This court previously ordered a stay of discovery until July 1, 1986 to avoid jeopardizing the government's pending criminal investigation into matters related to the closing of the Bank. See Golden Pacific Bancorp. v. Selby, No. 85-2384 Mem. & Order (D.D.C. Feb. 7, 1986) (Flannery, J.). At that time, the court recognized the government's substantial interest in preserving the secrecy of an ongoing criminal investigation.

The government now requests an extension

of that stay, citing the complexity of the matters under investigation and the difficulty of obtaining documentary evidence pertinent to the Bank's investment activities from the Republic of Taiwan. The government represents that the grand jury investigation has made substantial progress, but that additional time is needed to complete the investigation. So far, one indictment has already been returned against Wayne Liang, the marketing director of the Bank, who together with co-conspirators allegedly misapplied funds of the Bank and concealed their misapplication through false documents.

The court grants the government's request for additional time for the stay of discovery. Allowing civil discovery to

proceed at this point could greatly increase the danger that evidence and testimony might be fabricated to frustrate the criminal prosecution. Plaintiff's discovery requests are sweeping; they seek every document and item of information relating to the closing of the Bank. The delay will not unduly prejudice plaintiff; the records and files of the Bank are in good hands and it is still only a little over a year since the Bank was declared insolvent. The court notes, however, that staying discovery for this period of time is a drastic remedy and cannot be continued after October 1, 1986 absent a much stronger showing by the government of prejudice.

To keep the case moving along, the court

also orders the government no later than October 1, 1986, to file a written record compiled by the Comptroller in reaching his decision to close the Bank. It is this administrative record that will be the primary basis for determining whether the Comptroller acted arbitrarily or capriciously. See Bank of Commerce of Laredo v. City National Bank of Laredo, 484 F.2d 284 (5th Cir. 1973), cert. denied, 416 U.S. 905 (1974). Upon receiving the administrative record, plaintiff may decide that discovery is still needed to determine whether the agency considered all the relevant facts in making its determination. Defendants may claim no discovery is necessary. If so, after October 1, 1986, the parties may pursue discovery matters

through motions to compel or for a protective order. These motions will be handled by the Magistrate. Since the administrative record will be filed at this point, it is appropriate for the government to file a motion for summary judgment at this time as well.

An appropriate Order accompanies this Memorandum.

/s/
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - - X

GOLDEN PACIFIC BANCORP., :

Plaintiff. :Civil Action
No. 85-2384

- against - :

ROBERT L. CLARKE, Comptroller :
of the Currency, et al.,

:

Defendants.

- - - - - - - - - - - - - - - - - X

ORDER

This matter comes before the court on defendants' motion to dismiss plaintiff's first amended complaint and on defendants' motion for a protective order staying discovery. After consideration of the motions, the opposition thereto, and the entire record herein, it is, by the court, this 21st day of August, 1986,

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED that discovery is stayed in this matter until October 1, 1986; and it is further

ORDERED that defendants shall file no later than October 1, 1986 the administrative record in this matter; and it is further

ORDERED that defendants shall file any motion for summary judgment no later than October 1, 1986; and it is further

ORDERED that plaintiff may respond to defendants' motion for summary judgment no later than October 15, 1986; and it is further

ORDERED that the defendants may reply to plaintiff's opposition no later than

October 20, 1986; and it is further

ORDERED that a hearing is set in this matter for October 31, 1986, at 11 a.m.; and it is further

ORDERED that all discovery matters are referred to the U.S. Magistrate.

/s/_____
United States District Judge

cc: All counsel
U.S. Magistrates' Office

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - -x

GOLDEN PACIFIC BANCORP., :

Plaintiff, :Civil Action
No. 85-2384

- against - :

H. JOE SELBY, Acting Comptroller of the Currency. et al., :

Defendants. :

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MEMORANDUM

This matter comes before the court on defendants' motion for judgment on the pleadings, or in the alternative, for a stay of the proceedings pending a criminal investigation. Defendants' motion is granted in part and denied in part, and these proceedings are stayed until July 1,

1986.

I. Background

Plaintiff is the majority stockholder of the Golden Pacific National Bank ("Bank"). On June 21, 1985, the U.S. Comptroller of the Currency ("Comptroller") declared the Bank insolvent and appointed the Federal Deposit Insurance Corporation to act as receiver for the Bank.

On July 25, 1985, plaintiff brought suit in this court alleging four counts. In Count I, plaintiff claims a violation of the Fifth Amendment prohibition against unlawful takings absent just compensation or due process. Count II alleges that the Comptroller's action was arbitrary and capricious in violation of federal banking statutes and the Administrative Procedure

Act ("APA"), 5 U.S.C. § 701 et seq. Count III asserts that the Comptroller's action was a negligent tort within the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq. Plaintiff seeks monetary damages to compensate it for the lost value of its stock in the Bank, as well as injunctive relief restoring the Bank's charter to operate as a national bank.

On September 30, 1985, defendants answered the complaint.

On November 27, 1985, defendants filed a motion for judgment on the pleadings, or in the alternative, for a stay of the proceedings. In a Memorandum Order of December 16, 1985, this court resolved a discovery dispute by staying discovery pending a decision on defendants'

dispositive motion. Plaintiff responded to defendants' motion on December 30, 1985 and defendants replied on January 6, 1986. Oral argument was heard January 7, 1986. At that time the court requested that defendants file in camera any information regarding the criminal investigation underway related to this matter.

II. Discussion

The pleadings now before this court, which contain no exhibits, represent pleadings within the scope of Federal Rules of Civil Procedure ("FRCP") Rule 12. See Memorandum Order of December 16, 1985. The arguments set forth by defendants in their motion fall within two sections of Rule 12. Defendants' arguments regarding this court's jurisdiction over plaintiff's

claims are in the nature of a motion to dismiss for lack of subject-matter jurisdiction (Rule 12(b)(1)). Defendants' arguments regarding the merits of plaintiff's claims are in the nature of a motion for judgment on the pleadings (Rule 12(c)). For Rule 12(c), all well-pleaded material allegations of plaintiff are taken as true and all allegations of defendants which have been denied are taken as false. Moore's Federal Practice, ¶ 12.15. A judgment under Rule 12(c) may be entered only upon a conclusive determination of the issues of law and the only relief to which defendants are entitled is a dismissal without prejudice.

Defendants' basic arguments are threefold. First, this court has no

jurisdiction over monetary claims against the United States in excess of $10,000; such jurisdiction lies exclusively with the Court of Claims. Second, this court has no jurisdiction over the tort claim because such a claim is barred under the FTCA. Third, there is no merit to plaintiff's claim for just compensation under the Fifth Amendment. Finally, due to the pending criminal investigation in New York regarding the events leading up to the closure of the bank, defendants ask the court to stay these proceedings. Each argument is considered separately.

A. Jurisdiction over the Monetary Claim

Non-tort monetary claims against the United States are controlled by the Tucker Act, 28 U.S.C. § 1491 (1982). The district

courts and the Court of Claims have concurrent jurisdiction over Tucker Act claims, unless the claim is for an amount in excess of $10,000, in which case the Court of Claims has exclusive jurisdiction. 28 U.S.C. §§ 1346(a)(2) and 1491 (1982).

Defendants argue that this court lacks jurisdiction over the part of plaintiff's prayer for relief that seeks "an award of money damages against the United States of America in such amount as will fully compensate plaintiff and its shareholders for the damages suffered as a result of the conduct described herein." Since the amount requested is not limited to below $10,000, defendants argue that the Tucker Act precludes this court's jurisdiction.

The court agrees with plaintiff that this

is a tort action and tort relief is requested. The Tucker Act only applies to cases "not sounding in tort" and therefore has no application here.

B. Jurisdiction over the Tort Claim

Tort claims against the United are controlled by the FTCA and district courts have exclusive jurisdiction over FTCA suits. 28 U.S.C. §§ 2671 et seq. and 1346(b) (1982).

Defendants assert that plaintiff's tort claim does not fit FTCA for three reasons: (1) the proper procedure for suing in tort has not been followed; (2) the United States is not subject to tort liability for negligent regulation and supervision of a national bank; and (3) the United States owed no duty to plaintiff's Bank. This

court finds defendants first argument dispositive.

FTCA requires that administrative remedies be exhausted prior to bring suit. 28 U.S.C. § 2675 (1982). A party must file its claim with a federal agency and then receive either a final denial of the claim or six months must elapse from the time of filing. 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2.

Plaintiff filed its complaint with the Comptroller on July 24, 1985. No final denial of the claim was issued prior to that time. Defendants, therefore, argue that the claim must be dismissed.

Plaintiff objects that the government is taking advantage of a technical defense to obtain a dismissal of an otherwise valid

claim, causing the suit to be dismissed only to be refiled. The purpose of 28 U.S.C. § 2675(a) is to spare the court the burden of trying cases when an administrative agency can settle the case without litigation. Normally, the courts do not insist on wasteful and needless formalisms. Executive Jet Aviation, Inc. v. United States, 507 F.2d 508, 516 n.4 (6th Cir. 1974); Campbell v. United States, 534 F. Supp. 762, 764 (D. Hawaii 1982); De Berrio v. United States, 495 F. Supp. 179 (D.C.Z. 1980). The Comptroller's refusal to explain its action, its denial of notice or a hearing prior to the action, and its failure to act on the administrative complaint for six months shows that the intent of the statute has been fulfilled.

This court recognizes that the general purposes of the exhaustion requirement--conservation of judicial resources and orderly administration of justice--are not directly served by dismissal of plaintiff's FTCA claim. Yet because the FTCA constitutes a waiver of sovereign immunity, this circuit recognizes that the procedures set forth in section 2675 must be adhered to strictly. See Keene Corp. v. United States, 700 F.2d 836, 841 (1983). As this court has noted before, even "if the complaint is prematurely filed, a court cannot wait until the six-month period elapses and then assert jurisdiction; it may assert jurisdiction over a case only where the complaint is filed after the six month period." GAF Corp. v. United States,

593 F. Supp. 703 (D.D.C. 1984). There is little discretion in this inasmuch as the statute dictates this court's subject matter jurisdiction. Adherence to this rule indirectly serves the statute's purpose since it strongly discourages the filing of law suits until after the six-month period has elapsed. For these reasons, Count III of the complaint must be dismissed.

C. Plaintiff's Fifth Amendment Claim

Pursuant to 5 U.S.C. § 702 (1982), plaintiff seeks injunctive relief based upon the Fifth Amendment, which prohibits the taking of property for public use without providing just compensation. Defendants argue that the Comptroller's action cannot be considered a violation of

the Fifth Amendment. Courts have recognized substantial restrictions of property without compensation where they are necessary for the furtherance of important public interests. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). In this case, the Comptroller's decision declaring the Bank insolvent was necessary to promote the public interest.

Plaintiff responds that the government is asking this court to hold that the owners of a profitable $166 million asset bank can have no predictable property interest in the bank and no rights to due process when the bank is closed. This is contrary to common sense and contrary to case law involving bank closings. Roslindale Cooperative Bank v. Greenwald, 481 F. Supp.

749 (D. Mass. 1979), aff'd, 638 F.2d 258 (1st Cir.), cert. denied, 454 U.S. 831 (1981).

This court finds that plaintiff did have a protectible property interest in the assets of the Bank. The Penn Central case referred to by defendants concerned a state decision to declare a building a historic landmark, thus diminishing the property's value for alternative use. While such a restriction may be outside the "takings" clause, a restriction which operates to send property into receivership cannot be said, as a matter of law, to be outside the protection accorded by the Fifth Amendment. Plaintiff's substantial interest in the Bank apparently was not just limited, it was obliterated. The Comptroller has the

statutory authority to revoke a bank's charter and appoint a receiver. But such authority must be exercised in a non-arbitrary, non-capricious manner, otherwise there is a violation of due process. It cannot, at this time, be said that there is no way plaintiff can prove such a violation.

D. Stay of Proceedings

Finally, defendants ask that the court stay these proceedings until completion of pending criminal investigations. Defendants have submitted an in camera affidavit describing the nature of the investigation and the need to prevent civil discovery tactics from interfering with the investigation.

Plaintiff objects by asserting that

plaintiff is not a criminal defendant or about to become a criminal defendant. The criminal proceeding into related matters is still in the investigation stage and may never proceed to court. Plaintiff is entitled to have its claim determined without undue delay.

Stays of proceedings are routine where criminal charges are pending in a related criminal case. Founding Church of Scientology of Washington, D.C., Inc. v. Kelley, 77 F.R.D. 378 (D.D.C. 1977). This court is aware that plaintiff suffers some prejudice in having to wait for its claims to be heard simply because a criminal investigation is underway. Yet the government's affidavit strongly suggests that the criminal matters are closely

connected with actions that caused the Comptroller to shut down the bank. Pursuing defendants' justification for the closure through discovery in this civil matter would likely reveal information detrimental to the criminal investigation. Six months is an appropriate time to give the U.S. attorney's office to complete its investigation; at that time, the court will proceed with this matter by permitting discovery. Any further dispositive motions may be filed with this court before that time.

An appropriate Order accompanies this Memorandum.

/s/
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
- - - - - - - - - - - - - - - - -x

GOLDEN PACIFIC BANCORP., :

Plaintiff, :Civil Action
No. 85-2384
- against - :

H. JOE SELBY, Acting Comptroller of the Currency, et al., :

Defendants. :

- - - - - - - - - - - - - - - - -x

ORDER

This matter is before the court on defendants' motion for judgment on pleadings, or in the alternative, for a stay of the proceedings pending a related criminal investigation. After consideration of defendants' motion, the opposition thereto, and the entire record herein, it is, by the court, this 7th day

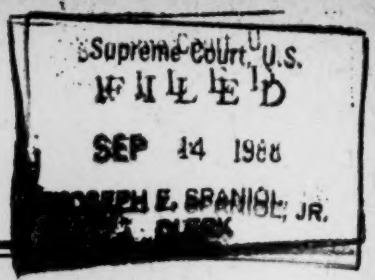
of February, 1986,

ORDERED that defendants' motion is partially granted in that plaintiff's count III is dismissed without prejudice; and it is further

ORDERED that discovery is stayed in this matter until July 1, 1986; and it is further

ORDERED that defendants' motion is denied in all other respects.

/s/_____
United States District Judge



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No. 88-89

In the Supreme Court of the United States

OCTOBER TERM, 1988

GOLDEN PACIFIC BANCORP., PETITIONER

v.

ROBERT L. CLARKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-89

GOLDEN PACIFIC BANCORP., PETITIONER

v.

ROBERT L. CLARKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that its claim against the Comptroller of the Currency arising out of the appointment of a receiver for a national bank was barred by the discretionary function exception to the Federal Tort Claims Act (28 U.S.C. 2680(a)).

1. a. Petitioner is a bank holding company that owned 90 percent of Golden Pacific National Bank (Bank) (Pet. 3). On June 17, 1985, on the basis of an informant's tip, the Comptroller of the Currency began a surprise investigation of the Bank. The Comptroller's examiners discovered that the Bank had been issuing certificates of deposit known (because of their color) as "yellow CDs," which were not recorded on the Bank's books and were never made available to the examiners during routine bank

examinations (Pet. App. 3a). The Bank claimed that the yellow CDs were investments, not deposits, and were subject to a form agreement that exonerated the Bank of liability for any loss of the customers' funds. The Bank was unable to produce any such signed agreements, however (*id.* at 4a).

To assess the Bank's financial condition, the examiners had to determine whether the yellow CDs were deposits with the Bank or, as Bank officials claimed, investments placed with the Bank as agent. If the yellow CDs were deposits, they represented off-balance sheet liabilities of the Bank and raised the question whether the Bank had sufficient off-balance sheet assets to avoid technical insolvency—an excess of liabilities over assets (Pet. App. 3a-4a). As to the first issue, Comptroller's examiners concluded that the yellow CDs were deposits (*id.* at 4a).[1] The CDs looked like ordinary certificates of deposit, stated a fixed rate of interest, set a maturity date, and bore the Bank's name across the top in block letters. The Bank also treated the yellow CDs in the same manner as ordinary CDs, honoring them upon maturity or, if appropriate, upon demand. No investments were liquidated to pay the CDs, and the return paid to customers did not reflect the risk of any investment.

As to the existence of off-balance sheet assets adequate to cover the yellow CDs, the examiners repeatedly asked Bank officials for documentation of these assets. On the last day of the examination, the Bank produced certain

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[1] This determination was confirmed by a federal district court in an action brought by the FDIC to obtain a declaration as to whether the yellow CDs represented insured deposits of the Bank such that their holders would be entitled to federal deposit insurance coverage. *FDIC* v. *Holders of Yellow Certificates Nos. 1-367,* No. 85-8164 (S.D.N.Y. Sept. 16, 1986). Pet. App. 7a.

documents. The documents related to a $7.8 million investment in a limited partnership (of which the Bank president's wife was the general partner), 83 unvalued condominiums in Taiwan, and several other financial arrangements, including stock in the Bank. Pet. App. 4a. The investments were not in the Bank's name, nor could the Bank document its ownership or legal interest in the investments (*id.* at 28a). Thus, the examiners were not satisfied that these investments were off-balance sheet assets owned by the Bank (*id.* at 4a).

By the end of the week, the Comptroller determined that the Bank's off-balance sheet liabilities exceeded its off-balance sheet assets, and, therefore, the Bank was insolvent.[2] The Comptroller also determined that the Bank was engaged in unsafe and unsound bank practices. In response, the Comptroller began preparing a cease and desist order to direct the Bank to stop soliciting or accepting any additional off-balance sheet deposits. Before the order was issued, however, examiners learned of a run on the Bank. In light of these events, on June 21, 1985, at 10:20 p.m., the Comptroller declared the Bank insolvent and placed it in receivership (Pet. App. 5a).[3]

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[2] Proper record keeping required that the Bank's official balance sheet include the off-balance sheet assets and liabilities. When the Comptroller added those assets and liabilities to the balance sheet, the Bank's liabilities exceeded its assets. This imbalance was inconsistent with the fundamental accounting principle that assets must equal liabilities.

[3] The President and a Vice President of the Bank were later indicted, *inter alia,* for allegedly using "false statements, fraudulent documents, phony signatures," and "off-book transactions" to deceive federal bank regulators about the Bank's true condition. Trial is set for September 26, 1988. *United States* v. *Chuang, etc., et al.*, Cr. No. 87-440 (S.D.N.Y.).

b. Petitioner filed suit, asserting claims under the Federal Tort Claims Act (FTCA) (28 U.S.C. 2671 *et seq.*), the Administrative Procedure Act (APA) (5 U.S.C. 701 *et seq.*), and the Fifth Amendment. The Comptroller moved to dismiss the FTCA claim on the ground that it was barred by the discretionary function exception (28 U.S.C. 2680(a)). The district court denied the motion, concluding that the discretionary function exception is inapplicable when the government acts in an "entirely arbitrary or capricious" manner (Pet. App. 56a). The court stated that petitioner has a "very heavy burden in proving this claim, since even a gross abuse of discretion may not predicate an award of tort damages" (*id.* at 57a). Ultimately, after carefully considering the record, the district court granted summary judgment in favor of the Comptroller on all causes of action. The court concluded that the Comptroller's decision was "rationally based, and was not arbitrary, capricious, or made in bad faith" (*id.* at 22a).

c. The Court of Appeals for the District of Columbia Circuit affirmed, but on different grounds. The court began by noting that, at oral argument, petitioner had conceded that the only relief it sought was money damages. Thus, the court observed, petitioner's claim under the APA "serves only as a device upon which to predicate damages for alleged arbitrary and capricious actions of the Comptroller" (Pet. App. 5a-6a). The court then rejected the submission that the FTCA permitted a cause of action for damages under these circumstances. Remarking that while this Court has not precisely defined " 'every contour' " of the discretionary function exception (*id.* at 7a (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984)), "the actions complained of here seem the very paradigm Congress had in mind in fashioning the exception" (Pet. App. 7a).

Reviewing the statutory basis of the Comptroller's powers, the court noted that the Comptroller has broad authority to ensure that national banks engage in "safe and sound" banking business. In carrying out his authority in this case, the Comptroller had to determine whether the yellow CDs were liabilities of the Bank and whether the Bank had non-booked assets to cover those liabilities. Both of these determinations are "obvious policy judgments regarding what constitutes safe and sound bank practices" (*ibid.*). Further, the court stated, "surely the decision to close the Bank—made after a week of examination and in the face of a run of withdrawals—could not possibly be thought of as other than a discretionary act that was committed by Congress to the Comptroller's judgment" (*ibid.*). The court thus found that damages under the FTCA were not available. The court also rejected the district court's view that "entirely arbitrary and capricious action" was not covered by the discretionary function exception (*id.* at 8a).[4]

2. The court of appeals' decision is correct. It does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review by this Court is not warranted.

a. A decision by the Comptroller of the Currency to appoint a receiver for a national bank plainly involves "the permissible exercise of policy judgment," *Berkovitz* v. *United States*, No. 87-498 (June 13, 1988), slip op. 5, and thus is insulated from suit under the FTCA by the discretionary function exception. As this Court has explained, the exception is designed to protect against "judicial 'second guessing' of legislative and administrative decisions

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[4] The court of appeals did not reach petitioner's Fifth Amendment claim, because it was argued on appeal only in petitioner's reply brief (Pet. App. 9a). Petitioner has not raised its Fifth Amendment claim before this Court.

grounded in social, economic, or political policy through the medium of an action in tort." *United States* v. *Varig Airlines,* 467 U.S. at 814. Government action qualifies for the exception when the conduct involves "an element of judgment or choice" and rests on "considerations of public policy" (*Berkovitz,* slip op. 4-5). The public policy and discretionary dimensions to the Comptroller's actions are evident from the statutory framework that defines the Comptroller's authority.

The Comptroller of the Currency has broad powers to preserve the integrity and stability of the national banking system. If a national bank violates applicable law or persists in unsafe and unsound banking practices, the Comptroller has the discretion to issue cease and desist orders, to impose civil money penalties, to remove officers or directors pursuant to statutory procedures (12 U.S.C. 1818), or to appoint a conservator for the bank (12 U.S.C. 203). Moreover, the Comptroller also has the discretion to appoint a receiver for a bank when he is satisfied that it is insolvent: whenever the Comptroller "shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, * * * appoint a receiver who shall proceed to close up such association." 12 U.S.C. 191.[5]

The language of Section 191 gives the Comptroller the authority to make discretionary judgments based on considerations of public policy. To begin with, the Comptroller "may" appoint a receiver; Section 191 does not require him to do so. *Washington Nat'l Bank* v. *Eckels,* 57 F. 870, 872 (C.C.W.D. Wash. 1893) (power vested in Comptroller to appoint a receiver is "discretionary").

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[5] In order to effectuate these broad powers, the Comptroller is given equally broad powers to conduct bank examinations. 12 U.S.C. 481.

Moreover, Section 191 authorizes the appointment of a receiver when the Comptroller is "satisfied" that a national bank is insolvent and that "due" examination has occurred. Becoming "satisfied" of insolvency is inherently discretionary, as is the determination of how much examination is "due." [6] Section 191 thus enables the Comptroller to react flexibly to evolving situations concerning troubled banks and to develop appropriate responses. In doing so, the Comptroller must consider the impact on depositors and the national banking system, the government's resources, and other factors. All of these considerations establish that the Comptroller's decision to find insolvency and to appoint a receiver is an act of discretion, implementing fundamental economic policy, and is protected against suit under the FTCA. See *United States* v. *Varig Airlines*, 467 U.S. at 819-820 (agency determination about the degree of supervision of safety procedures in design and construction of aircraft was discretionary, as it implicated priorities set in light of policy objectives and budget restraints); *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953) (establishing plans, specifications, and schedules for production and distribution of fertilizer was discretionary because "[w]here there is room for policy judgment and decision there is discretion").

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[6] Neither Section 191 nor the implementing regulations (12 C.F.R. 5.49(c)) define "insolvency." *In re Conservatorship of the Wellsville Nat'l Bank*, 407 F.2d 223, 226 n. 5 (3d Cir.), cert. denied, 396 U.S. 832 (1969). In *Wellsville Nat'l Bank*, the court expressed the view that "insolvency" encompasses both "the inability of a bank to meet its obligations" and the actual "closing of its doors" and observed that other courts have required that "for a bank to be solvent * * * it must own assets in an amount at least equal to its liabilities" (407 F.2d at 226 n. 5). In *In re Franklin Nat'l Bank*, 381 F. Supp. 1390 (E.D.N.Y. 1974), the Comptroller had found insolvency on the dual grounds that a bank could not meet its depositors' demands and that the bank had no real equity capital (*id.* at 1392-1393).

Recognizing the broad discretion of federal banking agencies, numerous lower courts have held that the decisions of the Comptroller and of other federal bank regulators in supervising banks and savings and loan associations are protected by the discretionary function exception. See *Emch* v. *United States,* 630 F.2d 523, 525-528 (7th Cir. 1980) (allegations of failure by the Comptroller to exercise due care in the regulation and examination of a bank), cert. denied, 450 U.S. 966 (1981); *Taylor* v. *Federal Home Loan Bank Board,* 661 F. Supp. 1341, 1349-1350 (N.D. Tex. 1986) (alleged wrongful cease-and-desist order and examination); *FDIC* v. *Jennings,* 615 F. Supp. 465 (W.D. Okla. 1985) (claim that the Comptroller wrongfully liquidated a bank), aff'd on other grounds, 816 F.2d 1488 (10th Cir. 1987); *FSLIC* v. *Williams,* 599 F. Supp. 1184, 1197-1200 (D. Md. 1984) (alleged excessive regulation); *First Sav. & Loan Ass'n* v. *First Fed. Sav. & Loan Ass'n,* 531 F. Supp. 251, 254-255 (D. Haw. 1981) (alleged conspiracy to place savings and loan in receivership); *First State Bank* v. *United States,* 471 F. Supp. 33, 35-36 (D.N.J. 1978) (alleged negligent bank examination), aff'd on other grounds, 599 F.2d 558 (3d Cir. 1979); *Newberg* v. *FSLIC,* 317 F. Supp. 1104, 1106-1107 (N.D. Ill. 1970) (alleged wrongful liquidation); *Davis* v. *FDIC,* 369 F. Supp. 277, 278-280 (D. Colo. 1974) (alleged wrongful closure).

Notwithstanding the language and purpose of Section 191, petitioner argues that the Comptroller's decision to declare a national bank insolvent is not a discretionary one, but is equivalent to the nondiscretionary "decision of a certified public accountant whether a corporation is or is not insolvent" (Pet. 9). This characterization misconstrues the nature and quality of the Comptroller's determination of a bank's insolvency, as recognized by this Court in *Easton* v. *Iowa,* 188 U.S. 220 (1903). In *Easton,* the Court held that a state law making it a crime for a bank officer to

accept deposits on behalf of an insolvent bank was preempted by federal laws regulating national banks, including the provision for the Comptroller to appoint a receiver when he is satisfied of the bank's insolvency (*id.* at 227, 231-232, 238). The Court observed that the determination "[w]hether a bank is or is not actually insolvent may be, often, a question hard to answer" and described the Comptroller as having "discretion" to decide whether "final insolvency" could be escaped before closing a bank (*id.* at 232). The Court emphasized that the discretion accorded to the Comptroller was inconsistent with the state's rigid rule requiring a bank to cease accepting deposits when insolvent (*ibid.*).

The Court's reasoning in *Easton* refutes petitioner's concept that the Comptroller's determination of insolvency is a ministerial matter of totalling figures on a balance sheet. Rather, the determination requires a careful evaluation of a bank's obligations and resources, based on limited and perhaps conflicting evidence. Becoming "satisfied" of insolvency in these circumstances plainly requires action "according to one's judgment of the best course" (*Dalehite* v. *United States,* 346 U.S. at 34). More fundamentally, the Comptroller's appointment of a receiver upon becoming satisfied of insolvency involves a range of policy considerations arising from the needs of the banking system and of the bank's depositors. As the court of appeals aptly stated, "[t]he Comptroller, incident to his responsibilities, must make innumerable subtle judgments in describing the content of safe and sound bank practices – judgments that draw upon a mix of law, accounting, bank custom, and policy." Pet. App. 7a. Plainly, the Comptroller's decision is "of the nature and quality that Congress intended to shield from tort liability." *United States* v. *Varig Airlines,*

467 U.S. at 813.[7]

b. Petitioner argues that the discretionary function exception should not cover lawless or bad faith administrative action (Pet. 9). The court of appeals correctly rejected this argument.[8] Petitioner appears to contend that

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[7] This Court's recent decision in *Berkovitz* v. *United States*, No. 87-498 (June 13, 1988), is entirely consistent with the court of appeals' holding. *Berkovitz* concerned an FTCA claim that the FDA had licensed the production of a polio vaccine and had approved release of a specific lot of the vaccine in violation of federal regulations. This Court held that "the discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow" (slip op. 4). The Court recognized, however, that a claim that the government incorrectly determined that a product complied with regulatory standards can be subject to the discretionary function exception. The test is whether, in determining compliance, "the agency officials making that determination permissibly exercise policy choice." *Id.* at 13. Application of that test here, as we have shown above, establishes that the discretionary function exception is available, since Section 191 gives the Comptroller great discretion in deciding whether a bank is insolvent and whether to appoint a receiver.

For similar reasons, petitioner is incorrect in asserting (Pet. 10) that the decision below is in conflict with *Myers & Myers, Inc.* v. *United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975). The court's refusal to apply the discretionary function exception in that case rested on the allegation that the Postal Service had acted in violation of its own regulations (*id.* at 1261).

[8] Petitioner contends that the decision below conflicts with *Huntington Towers, Ltd.* v. *Franklin Nat'l Bank*, 559 F.2d 863 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978). That contention misreads the Second Circuit's opinion. In *Huntington Towers*, a real estate developer whose loan commitments were not fulfilled by an insolvent bank sued the Comptroller, alleging that the Comptroller knew that the bank was insolvent five months before closing it, but "entered into an 'illegal and improper' plan to conceal it" (559 F.2d at 865). The court of appeals affirmed the dismissal of the claims against the Comptroller based on the discretionary function exception. (*id.* at

the FTCA should provide a remedy in money damages for decisions to close a bank based on assertedly incorrect determinations of insolvency. We believe that this view of the law cannot be reconciled with either the language or policy of the discretionary function exception. Section 2680(a) expressly immunizes the government against suit under the FTCA for discretionary acts or omissions, "whether or not the discretion involved be abused" (28 U.S.C. 2860(a)). If it is to have any meaning, the discretionary function exception must extend to "wrongful" conduct involving the exercise of discretion. To adopt petitioner's construction would read the discretionary function exception out of the FTCA. Under petitioner's view, the government's protection from a damages suit "would fail at the time it would be needed" (*Dalehite* v. *United States,* 346 U.S. at 36)—exactly when the government is accused of tortious wrongdoing. Permitting a tort suit upon allegations that discretion was exercised in bad faith would subject agencies to precisely the "sort of judicial intervention in policy making" through a tort suit that Congress meant to bar. *United States* v. *Varig Airlines,* 467 U.S. at 820.[9]

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at 870). In another part of the opinion, not discussing the FTCA, the court did state that "[a]bsent clear evidence of grossly arbitrary or capricious action * * *—a factor which does not appear to be present here—it is not for the courts to say whether or not the actions taken were justified in the public interest" (*id.* at 868). As the quoted statement indicates, the court did not have to address the appropriate treatment of grossly arbitrary and capricious conduct, nor did the court explain how its observation conformed to the FTCA's discretionary function exception. *Huntington Towers*' passing comment, in dicta, does not create a conflict with the decision of the District of Columbia Circuit here.

[9] See also *In re Consolidated United States Atmospheric Testing Litigation,* 820 F.2d 982, 996 (9th Cir. 1987), cert. denied, No. 87-953 (Feb. 29, 1988); *Smith* v. *Johns-Manville Corp.,* 795 F.2d 301, 308

This Court's decision in *Hatahley* v. *United States,* 351 U.S. 173 (1956), relied on by petitioner (Pet. 10), is not to the contrary. In that case, several Navajo Indians brought suit under the FTCA to recover damages for the destruction by federal agents of their horses which were grazing on public lands. This Court stated that, "[w]e are here not concerned with any problem of a discretionary function under the Act (see *Dalehite* v. *United States, supra*). These acts were wrongful trespasses not involving discretion on the part of the agents * * * " (351 U.S. at 181).

Even apart from the defects in his argument, petitioner's attempt to litigate the perimeters of the discretionary function exception is misplaced for an additional reason: this case presents no question of "bad faith" or "lawless" action. The district court addressed and rejected petitioner's claims that the Comptroller's decision was "arbitrary," "capricious," or in "bad faith." To the contrary, the court found that the decision was "rationally based" (Pet. App. 22a). There is, therefore, no occasion here to explore the outer reaches of the discretionary function exemption, since the Comptroller's actions here fell well within it.

c. Finally, petitioner argues that review of this case is appropriate since courts are not in agreement as to the "proper scope of the 'discretionary function' exception" (Pet. 11). None of the cases cited by petitioner exhibits any confusion about the application of the exception to the Comptroller or to regulatory conduct in any way similar to that involved in this case.[10]

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n.10 (3d Cir. 1986); *Allen* v. *United States,* 816 F.2d 1417 (10th Cir. 1987), cert. denied, No. 87-316 (Jan. 11, 1988); *Myslakowski* v. *United States,* 806 F.2d 94, 97-98 (6th Cir. 1986), cert. denied, No. 86-1389 (Mar. 30, 1987); *Cisco* v. *United States Through EPA,* 768 F.2d 788 (7th Cir. 1985).

[10] The cases relied upon by petitioner – *Brown* v. *United States,* 790 F.2d 199 (1st Cir. 1986), cert. denied, No. 86-528 (Jan. 20, 1987); *Eklof*

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1988

Marine Corp. v. *United States*, 762 F.2d 200 (2d Cir. 1985); and *Allen* v. *United States*, 816 F.2d 1417 (10th Cir. 1987), cert. denied, No. 87-316 (Jan. 11, 1988)—involve other agencies and other types of decisions. *Brown* involved the question whether the government could be held liable for the negligence of the National Oceanic and Atmospheric Administration in maintaining a weather observation buoy. In *Eklof*, the issue was whether the government could be held liable for the Coast Guard's alleged negligence in placing a navigation buoy. Finally, *Allen* merely lists FTCA decisions reaching different results in specific factual settings, none of which involved the type of activity at issue here.

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No. 88-89

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OCTOBER TERM, 1988

GOLDEN PACIFIC BANCORP.,

Petitioner,

vs.

ROBERT L. CLARKE, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTRODUCTION

Petitioner Golden Pacific Bancorp. respectfully submits this supplemental brief to urge that the decision below be vacated and remanded to the Court of Appeals for the District of Columbia Circuit for further consideration in light of this Court's opinion in *Berkovitz by Berkovitz* v. *United States*, 108 S. Ct. 1954 (1988). The *Berkovitz* decision was rendered in June, 1988, near the end of the Court's October 1987 Term, and petitioner was unaware of that decision when the petition for a writ of certiorari was filed. Pursuant to Rule 22.6 of this Court's rules, a supplemental brief such as this one may be filed at any time while the case is pending on petition for a writ of certiorari.

ARGUMENT

In our original petition for a writ of certiorari, we explained that the correctness of the judgment of the Court of Appeals turned upon its application of the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a). Here, the particular act that the petitioner challenged in its district court complaint was the decision of the Comptroller of the Currency to declare the Golden Pacific National Bank insolvent and thereafter to appoint a receiver to take over possession of the Bank's assets and operation of its business. The complaint alleged that the Bank was not in fact insolvent, and that the Comptroller's decision had been made in bad faith.

The Court of Appeals affirmed the dismissal of the complaint without reaching the merits, holding instead that the Comptroller's declaration that the Golden Pacific National Bank was insolvent was a "discretionary function" that fell outside of the FTCA's waiver of sovereign immunity.

Regrettably, when the Court of Appeals issued its decision, it did not have the benefit of this Court's holding in the *Berkovitz* case, *supra*. Evidently responding to the confusion among the lower courts to which we alluded in our petition for certiorari, the Court in *Berkovitz* undertook to clarify the scope of the "discretionary function" exception to FTCA liability. At issue in that case was the decision of the National Institutes of Health's Division of Biologic Standards to license a polio vaccine. Allegedly, the DBS licensed the vaccine without having received required safety data. The district court in that case, like the district court in the instant case, had held that the discretionary function exception to the FTCA did not apply, and that the suit therefore could be maintained. The Court of Appeals, however, again like the Court of Appeals in this case, disagreed, and held that the action was barred under 28 U.S.C. § 2680(a).

This Court granted certiorari, and held that the discretionary function exception did not apply. Much of the discussion in the Court's opinion in *Berkovitz* applies with equal force in this case. Specifically, the Court took pains to reject the Government's

argument that "the exception precludes liability for any and all acts asrising out of the regulatory programs of federal agencies." 108 S. Ct. at 1959-60. Rather, the *Berkovitz* Court held that regulatory conduct is not discretionary unless "it involves an element of judgment or choice." 108 S. Ct. at 1958. Therefore, the exception does not apply "when a federal statute, regulation, or policy specfically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." 108 S. Ct. at 1958-59. Put otherwise, the "discretionary function" exception "protects only governmental actions and decisions based on considerations of public policy." 108 S. Ct. at 1959.

These principles, taken directly from the Court's subsequent decision in the *Berkovitz* case, are incompatible with the analysis of the Court of Appeals in the instant case. Here, the Court of Appeals focused on the broad authority of the Comptroller of the Currency to ensure that national banks "follow safe and sound banking policies." (Pet. 7a). The Court never focused on the facts that, under *Berkovitz*, are critical: whether the Golden Pacific National Bank was insolvent, and whether the Comptroller's declaration of insolvency was made in bad faith. If, as the complaint alleged, the Bank was not actually insolvent,[1] and if the Comptroller's declaration was made in bad faith, then the "discretionary function" exception as this Court recently reinterpreted it in *Berkovitz* is not a bar to tort liability.

It is significant, in this regard, that the Comptroller is required by statute to make "due examination" of the affairs of a national bank, and to be satisfied that the bank is in fact insolvent, before

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[1] Even today, we have received documentary evidence in the form of an FDIC balance sheet showing that the Bank's assets remain some $9 million dollars in excess of its liabilities. Likewise, the complaint squarely alleged that the Comptroller's conduct "was in direct violation of the applicable federal banking statutes and regulations." (¶ 33).

he may appoint a receiver to close up the bank. Insolvency is not a matter of "judgment or choice." Neither is the Comptroller's obligation to make "due examination" of the bank's affairs. Here, the complaint alleged, in substance, that the Golden Pacific National Bank was not insolvent and that the Comptroller did not make "due examination" of the bank's affairs. Under these circumstances, the closure of the bank should not have been insulated from damage liability. Put otherwise, the closure of a solvent bank is not a matter that is the "product of judgment or choice" by the Comptroller of the Currency, 108 S. Ct. at 1959, and such an unlawful act is not exempted from liability under the FTCA under this Court's holding in the *Berkovitz* case.

Because this Court has now clarified the meaning of the "discretionary function" exception in the *Berkovitz* case, and because it has eliminated the legal gap to which we made reference in our petition for a writ of certiorari, it is not essential to grant plenary review in this case. Rather, the Court should pursue the course that it typically takes when a decision of a court of appeals has been called into question by a subsequent decison by this Court. That is, it should grant the writ of certiorari, summarily vacate the judgment of the court below, and remand the case to the court of appeals for further consideration in light of the supervening authority. This, we submit, would be the appropriate disposition in this case.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals vacated and remanded for further consideration in light of *Berkovitz*, *supra*.

Respectfully submitted,

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